United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C.

Date: August 25, 1997

CASE NO: 95 INA 155

In the Matter of:

LINDA KIPP,
Employer,

On Behalf of:

BOZENA MOSZCZYNSKA,
Alien

Appearance: P. W. Janaszek, New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Bozena Moszczynska (Alien) by Linda Kipp (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On January 21, 1994, the Employer applied for labor certification to permit her to employ the Alien on a permanent basis as a Cook Live-Out Domestic to perform the following duties in her household:

> Prepares menus and cooks meals with low-fat, low-cholesterol, low-salt contents. Purchases foodstuffs and accounts for the expenses incurred. Bakes breads and prepares pasta. Steams, bakes, poaches and braises vegetables. Prepares salads and dressings. Cooks soups and pasta sauces. Prepares desserts based on fruits and grains. Performs seasonal cooking duties, such as preserving fruits. Cleans kitchen and cooking utensils.

The work week was forty hours from 10:00 AM to 7:00 PM with no overtime at the rate of $12.48 per hour. The position was classified as Cook (Household)(Live-Out), under DOT Code No. 305.281-010. The application (ETA 750A) indicated as education requirements the completion of elementary and high school, and further required that applicants have two years of experience in the Job Offered. AF 02. In an addendum to the application, the Employer discussed her need for a household cook. She said that her mother suffered from Parkinson’s disease and requires a special diet that consisted of low fat, low cholesterol, and low salt foods, indicating that she required household help to supply such meals on a regular basis, as she is employed full time, herself. AF 07.

After the position was advertised, responses received from seven U. S. workers were referred to the Employer, who reported that none of them wee hired. AF 51-52, and see AF 26-30, 34, 38-40, 43, 45, 47, 50. The State agency, however, noted at least one qualified applicant and concluded that U. S. workers were available for the position offered. 54-55.

Notice of Findings. On August 22, 1994, a Notice of Findings (NOF) by the CO advised that certification would be denied unless the Employer corrected the defects noted.

1. The CO said the Employer failed to document that her requirements for the position are the minimum necessary for the performance of the job within the provisions of 20 CFR § 656.21 (b)(5). Observing that the Alien had no experience in the job before she was hired by the Employer, the CO required Employer to show that U. S. workers could not be trained to perform this job or, in the alternative, to reduce the job requirements to the qualifications of the Alien at the time she was hired.

2. The CO required Employer to document that requirements for the position arose from business necessity and are normally required for the performance of this job in the United States. 20 CFR 656.21(b)(2). The CO then noted that the duties described in the application are not fulltime employment in the context of this household.[2] The CO required that this finding be rebutted with evidence that the Employer's need for a household cook arises from a business necessity rather than employer preference or convenience and is customary to the employer. 20 CFR § 656.21 (b)(2)(i). In a series of nine starred paragraphs the CO set out the evidence to be filed in Employer's rebuttal to prove that the job offered is a fulltime position. The required information was stated in the form of requests for specific facts and responses to questions that were designed to draw out the collateral information the CO required to address this issue.

3. The CO noted that five U. S. workers had applied for this position and, although they appeared qualified on the basis of their resumes, all of them were rejected by the Employer. The CO directed that on rebuttal the Employer must establish that these applicants were not qualified for the job by education, training, experience, or a combination thereof. 20 CFR §§ 656.24(b)(2)(ii), 656.21(b)(6), 656.21 (c)(8), 656.21(j).

Rebuttal. On September 20, 1994, the Employer filed a rebuttal in which she addressed the issues set out in the NOF. Her arguments as to the U. S. workers repeated her May 6, 1994, report to the State agency, and her discussions of her need for the position and the Alien's qualifications were the same as her application and addendum, all of which were discussed above.

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[2]The CO cited 20 CFR § 656.50, but there is no such regulation. It is assumed that the CO meant to refer to the definitions for this part at 20 CFR § 656.3, which contains the following: "Employment means permanent fulltime work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee."

Final Determination. On September 28, 1994, the CO denied this application for certification on several grounds based on the issues raised in the NOF. The CO denied the certification requested by the Employer for the reasons that follow.

1. The CO found that the Employer failed to rebut the finding in the NOF that she had not established the existence of a permanent fulltime position of employment as a household cook. First, the CO rejected the time estimated for daily components of the job functions, concluding that eight hours was an too great to allot to the performance of this work. The CO also found that the Employer did not establish that she has customarily required fulltime cooks in the past and that there were no other houseworker or entertainment or child care duties, all of which contradicted the contention that this job was permanent, fulltime employment. The CO then said, "It appears rather, that an effort is being made to qualify the alien under the 'Skilled Worker' category because of the unavailability of visa numbers in the 'Other Worker' category of employment based preferences."

2. The CO concluded that, while the Employer successfully rebutted the NOF findings as to her rejection of U. S. applicants Trapiano, Haynia, and Chambers, the CO's findings as to the rebuttal's statement of reasons for rejecting Farran and Troge were not acceptable. First, Mr. Farran denied Employer's claim that he was not interested in the position and that he had found employment, saying the Employer never contacted him. Second, Ms. Troge denied that she had refused the position, and contradicted Employer's version of their conversation. Where Employer said Ms. Troge refused to accept the hourly rate offered, Ms. Troge said this was acceptable, but that Employer wanted her to work during weekends at the same rate and they had disagreed on the prevailing hourly rate for that period. The discrepancy between these accounts of their contacts were noted in the NOF and the Employer was given an opportunity to respond, said the CO.[3]

As the CO found that the Employer did not present evidence to support her version of these conversations, her representations were not given greater weight than the reports of the U. S. job applicants, who were not interested parties in this application.

Employer's appeal. In seeking review of the denial of certification the Employer took issue with the CO's findings as to the household schedule, which she said were inconsistent with the evidence she had presented in rebuttal. She offered an explanation of the amounts of time required for shopping, the preparation of lunch and dinner, and the role of the Employer's sister in the household. In addition, the Employer said the CO's

[3]In the instance of Ms Troge, the omission of an hourly rate for overtime work in the employer's application gave this contact greater importance, since this materially changed the position offered after it was advertised.

gratuitous comment as to her motives was inappropriate to the consideration of her application, implying that a predisposition existed in this case. Finally, she argued that she was entitled to greater credibility than job applicants Farran and Troge. AF 94-97.

DISCUSSION

1. The CO initially represented that this application turns on whether Employer is offering permanent fulltime employment, and to the extent that the denial of certification is based on the CO's conclusion that this was not a fulltime job the FD is based primarily on the CO's interpretation of the schedule of work functions and performance times that were presented in the Employer's rebuttal. The Employer strongly disagrees with the CO's construction, contending that the duties described are sufficiently substantial to occupy an eight hour day of work.

Even though the issue appealed appears on it face to be well joined, it is impossible to address this conflict because the CO also indicates that this application was denied by weighing the Employer's rebuttal in response to directions that the "business necessity" of this position be established. The failure to prove the business necessity of this job is an insufficient reason for the denial of certification, as the Employer is not required to prove the necessity for the position, if a bona fide job does exist. **Abedlghani and Houda Abadi** , 90 INA 139 (June 4, 1991); **Hubert Peabody,** 90 INA 230 (Apr 30, 1991); **Joon Sup Park,** 89 INA 231 (Mar. 25, 1991); **Shinn Shyng Chang,** 88 INA 028 (Sept. 21, 1989); **Timmy Wu,** 87 INA 735 (June 28, 1988). In **Teresita Tecson**, 94 INA 014(May 30, 1995), the Board applied "business necessity" to the hiring of a household employee in terms of documentation of the 'business necessity' of a particular restrictive job requirement under the holding in **Information Industries, Inc.**, 88-IA-082 (Feb. 9, 1989)(en banc). The panel in **Teresita Tecson** said that, "The business in this case is the operation of the household."

As no restrictive job requirement is found in Employer's application, however, it is illogical for the CO to require the Employer to prove that a bona fide job exists by demonstrating its "business necessity," a notion that has nothing to do with either the content of the job or the time required to accomplish the work, itself. For this reason, it is concluded that the CO was in error in requiring the Employer to prove the "business necessity" of this position and in considering this as a primary criterion in denying certification on grounds that the Employer failed to prove the existence of fulltime employment under the Act and regulations.

2. The CO gave significant weight to Employer's rejection of the two U. S. job applicant workers who were found qualified on the basis of their resumes. In the NOF the CO required that the Employer establish that the five U. S. workers who responded to the Employer's advertisement were not qualified for the position by training or experience, or a combination thereof, based on 20 CFR §§ 656.24(b)(2)(ii), 656.21(b)(6), 656.21 (c)(8), 656.21(j). While the CO accepted the Employer's rebuttal as to three of the applicants, there does not appear to be any dispute that two of the five were, in fact, adequately qualified for the job. For this reason it can be found that qualified U. S. workers exist and the contrary cannot be demonstrated for purposes of the Act and regulations.

In spite of the NOF findings, the issue thus shifted to the availability of these workers to the Employer, and the interplay between the U. S. applicants and the Employer in their contacts following the publicizing of the job became the central issue. The statements of the workers in response to follow up inquiries are materially different from those of the Employer, and the collateral issues that their version of the conversations suggest are sufficient to accord them at least a reasonable degree of credibility. For this reason it is found that the evidence of the Employer is in equilibrium with opposing versions of the post advertising contacts and must be weighed accordingly.

Certification is a privilege that the Act confers by giving favored treatment to specified foreign workers, whose skills Congress seeks to bring to the U. S. labor market to meet a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). For this reason the Employer has the burden of proof as to all of the issues arising under the Act and regulations because the privileged status certification would confer on the Alien in this case is an exception to the statutory limitation on immigration for permanent residence and employment in the United States. The burden of proof is expressly addressed in 20 CFR § 656.2(b), which quoted from § 291 of the Act (8 U.S.C. § 1361) the conditions Congress placed on the grant of certification:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act ... .

As the certification for the Alien that the Employer seeks under the Act is an exception to its broad limits on immigration into the United States, the evidence offered under the Act is strictly construed under the principle that statutes granting exemptions

from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896)[4]. It follows that the Employer must present evidence that is commensurate with the favorable and advantageous treatment that she seeks in applying for special permission for this Alien to enter the United States lawfully and hold this position of permanent employment.

It follows that the Employer in this case cannot sustain her burden of proof because she did not present the greater weight of evidence to establish that she rejected the U.S. applicants for lawful, job-related reasons. Moreover, the omission of an hourly rate for overtime work in the Employer's application supports the report by Ms Troge, as their dispute centered on work beyond the forty hour week, and the Employer's failure to provide for such a contingency was conspicuous in the context of this case. Giving particular weight to the CO's finding that the Employer did not present evidence to support her version of her contact with Ms Troge, it is appropriate to affirm the conclusion of the CO that the evidence the Employer presented under the Act and regulations cited above should not be given greater weight than the evidence of the reports of the U. S. job applicants.

Conclusion. As the CO's conclusion that the Employer failed to establish that she rejected the U. S. applicants for lawful, job-related reasons should be affirmed, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is hereby affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

[4]In construing a tariff act, the Supreme Court there held that, "Such a claim is within the general principle that exemptions must be strictly construed, and that doubt must be resolved against the one asserting the exemption," citing its previous decisions in **People v. Cook**, 148 U.S. 397, 13 SCt 645; and **Keokuk & W. R. Co. v. Missouri**, 152 U. S. 301, 306, 14 SCt 592.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

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Sheila Smith, Legal Technician

BALCA VOTE SHEET

CASE NO: 95-INA-155

LINDA KIPP,
Employer,
BOZENA MOSZCZYNSKA,
Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

This has been redrafted and is again submitted for the panel's consideration. Please append your dissent or concurrence to the BALCA Vote Sheet and return to me.

Thank you,

Judge Neusner

Date: July 21, 1997